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Supreme Court, U.S.
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No. 97-2049

In The
Supreme Court of the United States

October Term, 1997

CONDOR INSURANCE COMPANY,
Petitioner,

vs.

LISA CHRISTINE ERIKSEN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONDOR INSURANCE COMPANY'S PETITION FOR REVIEW RAISES ISSUES WHICH WERE NOT PRESENTED TO THE LOWER COURTS AND CONTAINS MISSTATEMENTS.

Defendant/Appellant/Petitioner, CONDOR INSURANCE COMPANY (hereinafter referred to as "Petitioner" or "CONDOR"), has submitted a Petition for Review to this Court which is so replete with misrepresentations and inadmissible evidence that this Opposition was required.

This litigation has its inception in a truck vs. automobile accident (hereinafter referred to as "the underlying accident") between Plaintiff/Respondent, LISA CHRISTINE ERIKSEN (hereinafter "Respondent" or "Eriksen"), and William Joseph Schuler (hereinafter referred to as "Schuler" or "CONDOR's insured") which occurred on or about September 6, 1989. The accident was caused by Schuler when Schuler, driving a massive sand and gravel truck, made a right turn to get on to the Ventura Freeway (westbound) from the center southbound lane of Las Virgenes Canyon Road. Before Schuler executed this right turn, Eriksen was stopped at a red light in the far right southbound lane of Las Virgenes Canyon Road also waiting to make a right turn to get on to the Ventura Freeway (westbound). Abruptly, Schuler made a right turn in an effort to get onto the Ventura Freeway westbound on-ramp. Apparently Schuler did not see Eriksen's car. When Schuler made the right turn, Schuler's massive vehicle literally dragged Eriksen's stopped vehicle down the onramp, crushing it between the side of the massive sand and gravel truck and the freeway onramp guardrail.

As a result of the underlying accident, Eriksen's 1985 Ford Tempo automobile was severely damaged. Eriksen suffered, among other injuries, a serious injury to her back (including a herniated disc) which, to this day, still causes Eriksen constant, and sometimes disabling, pain. Eriksen also experiences numbness in her legs and other related problems.

CONDOR's Petition for Review makes reference to a police report which puts Eriksen at fault for the automobile accident. The police report not only constitutes inadmissible hearsay (and also is not relevant to the matters at issue in this case), the information in the police report directly contradicts the testimony of the actual percipient witnesses to the accident. Also, based upon the interplay between the officer and the scene of the accident and Schuler, it is believed that the officer and Schuler were long-time friends. CONDOR's claim that Eriksen was not injured in the accident is contrary to all medical evidence and is patently false.

At the time the underlying accident occurred, Schuler was employed as a truck driver by Quality Rock & Gravel Company (hereinafter referred to as "Quality Rock" or "CONDOR's insured") and was acting within the course and scope of his duties. Petitioner, CONDOR, was the insurer of Quality Rock and Schuler at the time the underlying accident occurred.

On or about November 22, 1989, Eriksen filed a Complaint in the Superior Court of the State of California, County of Los Angeles, Northwest District, entitled Lisa Christine Eriksen v. William Joseph Schuler, et al., Case Number NWC053623 (hereinafter referred to as "the underlying litigation") in which Eriksen sought an award of

damages for the injuries caused to Eriksen in the underlying accident. CONDOR's insureds were served with the Summons, Complaint and Statement of Damages in the underlying action.

Quality Rock was served by substituted service in the underlying litigation on or about June 20, 1991. Schuler was served by publication in the underlying litigation which became effective on or about December 13, 1991. As discussed below, although Schuler was served by publication, Schuler testified under penalty of perjury that he did in fact receive the Summons, Complaint and Statement of Damages mailed to him as part of the publication process. Neither Schuler or Quality Rock responded to Eriksen's Complaint in the underlying litigation.

It should be noted that, contrary to the representations made in CONDOR's Petition, although Eriksen was involved in four (4) different automobile accidents during an eleven (11) month period, there is no evidence that Eriksen suffered any significant physical injury in any of these automobile accidents other than the last accident which was caused by Schuler. Rather, all of these other accidents were included in Eriksen's Complaint in the underlying litigation to prevent Schuler and/or Quality Rock from raising the "empty chair" defense. All of Eriksen's claims against the other three (3) defendants named in the underlying litigation were settled for nominal amounts (i.e., for the amount to repair minor property damage done to Eriksen's car) or abandoned.

On February 4, 1993, the underlying action came on regularly for trial in the Superior Court for the State of California, County of Los Angeles, Northwest District, on the default calendar, the Honorable Robert M. Latteau, Judge Presiding. At trial, Judge Latteau gave judgment for

Eriksen and against Quality Rock and Schuler in the amount of $228,500.00.

As set forth below, Petitioner, CONDOR, was notified of the judgment against its insureds, at the latest, prior to December 3, 1993.

On January 12, 1994, Quality Rock (not CONDOR or attorneys provided by CONDOR on Quality Rock's behalf) moved to set aside the default judgment entered against it in the underlying litigation. Petitioner, CONDOR, refused to become involved in the underlying litigation. Quality Rock's Motion to Set Aside Default was denied on January 12, 1994. Quality Rock timely appealed the Court's denial of Quality Rock's Motion to Set Aside Default. Thereafter, Quality Rock declared bankruptcy and, ultimately, abandoned its appeal. CONDOR did not pursue the appeal and, in fact, intentionally refused to take part in the underlying litigation. On July 18, 1995, the appeal in the underlying litigation was dismissed for lack of prosecution. The Order of Dismissal became final on September 20, 1995.

The Motion to Set Aside Default in the underlying litigation was brought by Quality Rock only. Schuler was not a party to said Motion to Set Aside Default and did not join in Quality Rock's Motion to Set Aside Default. In fact, even if Schuler wanted to set aside the judgment in the underlying litigation, any Motion to Set Aside the Default brought by Schuler would have been futile. In this regard, Schuler testified that Schuler had in fact received the Summons, Complaint and Statement of Damages mailed to him in the underlying action as part of the publication process.

As set forth above, CONDOR was first notified of the underlying accident and the underlying litigation, at the latest, prior to December 3, 1993 by its insured, Quality Rock. Nonetheless, CONDOR did not even: attempt to set aside the default entered against its insureds in the underlying litigation; pursue the appeal in the underlying litigation; intervene in the underlying litigation; undertake to defend its insureds in the underlying litigation; or, do anything else to protect its insured's interests in the underlying litigation. Rather, CONDOR completely sacrificed its insureds to protect its own interests. In fact, even though CONDOR had notice of the judgment against its insureds in the underlying litigation, at the latest, prior to December 3, 1993, CONDOR steadfastly refused to take any action with regard to the underlying judgment until July 1994 when Plaintiff attempted to collect that judgment directly from CONDOR[1].

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[1] When Respondent began to pursue collection of the judgment from CONDOR, a Motion was filed by CONDOR on September 29, 1995 to set aside the default in the underlying litigation pursuant to Jade v. Viguri (1989) 210 Cal.App.3d 1459. This motion would not relieve Quality Rock or Schuler from the default judgment. However, CONDOR as an insurer would then have been able to litigate the underlying judgment on its merits. With regard to CONDOR's motion to set aside in the underlying litigation, CONDOR states that CONDOR's Motion to Vacate/Intervene in the underlying litigation was taken off-calendar "because of Quality Rock's bankruptcy." This statement is obviously false. The automatic stay in bankruptcy

Although Quality Rock and Schuler were insured by CONDOR under CONDOR's policy of common carrier automobile insurance (hereinafter referred to as "the policy") when the underlying accident occurred, CONDOR refused to participate in the underlying litigation "because its insureds failed to notify CONDOR that they had been served with the Summons and Complaint in the underlying litigation and, therefore, CONDOR had no obligation to pay the final judgment in the underlying litigation." CONDOR admits that when CONDOR made this tactical decision not to participate in the underlying litigation, CONDOR did not realize that pursuant to Public Utilities Commission of the State of California, General Order No. 100 Series, by issuing the policy in the State of California, CONDOR agreed "to pay any final judgment" rendered against CONDOR's insureds even if CONDOR's insureds breached the policy by failing to notify CONDOR about the underlying accident.

By the time CONDOR realized that it would have to pay any final judgment entered against its insureds whether or not CONDOR had notice of the underlying litigation, CONDOR's avenues of legal recourse were quite limited and

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resulting from Quality Rock's bankruptcy filing would not, and could not, affect CONDOR's motion to set aside the judgment in the underlying litigation because CONDOR was not pursuing the collection of a judgment against Quality Rock. More importantly, Schuler was not in bankruptcy so CONDOR could have still pursued its motion to set aside default judgment using Schuler as the underlying defendant without regard to Quality Rock's bankruptcy.

the only way CONDOR could avoid paying the judgment was to somehow show that the underlying judgment was "void on its face" or "was the result of fraud, mistake or collusion."[2] In a desperate attempt to come up with some defense to this litigation, CONDOR concocted the argument which CONDOR pursued in state court -- that the judgment entered against Quality Rock and Schuler was void in its face because "due process" requires a more specific Statement of Damages than the one which was served on Quality Rock and Schuler. However, because there was no law or evidence to support this spurious and bad faith attempt by CONDOR to avoid its statutory and contractual obligations as an insurer of common carriers, the trial court granted Eriksen's Motion for Summary Judgment/Summary Adjudication regarding this defense.

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[2] Because CONDOR was unable to come up with any evidence indicating that Respondent was engaged in any "fraudulent" or "collusive" conduct, CONDOR abandoned this defense.

With regard to all of the above, it is rather ironic that only now, after CONDOR's own assets have been threatened, does CONDOR claim with indignity that the "due process" rights of its insureds have been violated -- people whose rights CONDOR declined to protect even though those people paid CONDOR between $5,000.00 and $8,000.00 per month for insurance for over four years. Respondent submits that if CONDOR was truly concerned with the "due process" rights of its insureds, CONDOR would have assumed the defense of its insureds and participated in the underlying litigation.

It should also be noted that CONDOR was also precluded from having the trial court exercise its equitable jurisdiction to grant CONDOR relief from the judgment in the underlying litigation because CONDOR did not "exhaust its legal remedies" by pursuing the underlying litigation.

It should also be noted that CONDOR was not diligent in its efforts to obtain equitable relief from the judgment in the underlying litigation.

On the other hand, Eriksen will clearly suffer extreme and irreparable prejudice if CONDOR is granted equitable relief from the judgment in the underlying litigation. In this regard, if CONDOR had intervened in the underlying litigation on or about December 3, 1993 (the latest date on which CONDOR received notice of the underlying litigation) and had at least attempted to obtain relief from the default in the underlying litigation, a judgment in the underlying litigation would have necessarily been rendered by now. However, as a result of CONDOR's dilatory tactics, if CONDOR is granted relief from the judgment in the underlying litigation (and Petitioner is somehow given the opportunity to litigate the claims raised

in the underlying litigation), Eriksen will be forced to carry the burden of proof as to matters which occurred more than seven (7) years ago.

CONDOR essentially seeks to do what the California Supreme Court condemned in Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal.3d 778 wherein the court specifically stated at page 778:

> "Recognizing 'the serious need to update California's jurisdiction and service of process statutes' the California Judicial Council and State Bar, following a joint study, recommended a comprehensive revision of the California statutes. The suggested changes, including Section 416.10, which governs service upon corporations, were enacted by the 1969 legislature. Although some decisions under pre-1969 statutes required strict and exact compliance with the statutory requirements, the provisions of the new law, according to its draftsmen 'are to be liberally construed ... as stated in the November 25, 1968, Report of the Judicial Council Special Committee on Jurisdiction, page 14-15: 'The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the Court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint ...'. The liberal construction rule, it is anticipated, will eliminate unnecessary, time consuming, costly disputes over legal

technicalities, without prejudicing the rights of defendants to proper notice of court proceedings.'

The case at bar demonstrates the desirability of liberal construction of the new statutes. Defendants here had their opportunity to press the merits of any possible defense; they presented none; they actually have none. Recognizing their liability, they deliberately decided to permit plaintiff to obtain the default judgment. Yet they now seek to invoke a technical defect in service to set aside the judgment, not to present a defense, but, by vacating the judgment, can nullify plaintiff's lien upon the last remaining asset of the corporation and thereby leave plaintiff powerless to collect and acknowledge debt." (Emphasis added.)

The court in Pasadena Medi-Center, supra, then goes on to state that the equitable principles such as estoppel and laches "sweep across the civil law" and that there is absolutely "no reason to depart from these principles merely because the issues involved concern service of process".

In this case, CONDOR could have promptly assumed the defense of its insureds in the underlying litigation immediately after CONDOR was notified of the underlying litigation on December 3, 1994. Alternatively, CONDOR could have intervened in the underlying litigation after CONDOR learned of the underlying litigation on December 3, 1994. Or, CONDOR could have done both just as the insurer did in Jade v. Viguri (1989) 210 Cal.App.3d 1459. However, CONDOR did not choose any of these

alternatives. Rather, CONDOR chose to attack the judgment in the underlying litigation in this case after the judgment in the underlying litigation became final thereby "invoking a technical defect in service to set aside that judgment, not to present a defense, but, by vacating the judgment, to leave plaintiff powerless to collect an acknowledged debt" -- the exact procedure which the California Supreme Court condemned in Pasadena Medi-Center, supra. This is also the type of conduct which the California legislature sought to prevent by requiring that all policies of commercial common carrier insurance issued in the State of California include a standard form endorsement providing that the insurer "will pay any final judgment against its insured."

It should be noted that the trial court's factual determination that CONDOR delayed too long before CONDOR made any effort to protect CONDOR's own rights or the rights of CONDOR's insureds is typically a factual determination left to the sound discretion of the trial court. Additionally, given the duration and intentional nature of CONDOR's delay in this case, there can be no doubt that CONDOR's delay was excessive "as a matter of law." Similarly, the determination as to whether the trial court should exercise its equitable powers to relieve CONDOR from the default judgment against CONDOR's insureds in the underlying litigation is a matter left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion (see Eisenberg, Horvitz and Weiner, California Practice Guide: Civil Appeals and Writs (TRG 1997) at §8:93 et seq.).

Based on the above, CONDOR is precluded, by its own intentional conduct, from obtaining relief in this litigation from the judgment against CONDOR's insureds in the underlying litigation.

It is also critical to not that CONDOR never questioned the constitutionality or the validity of the those provisions of California law requiring an insurer of common carriers to pay final judgment against its insured, even if the insured conceals the claim from the insurer (see California Court of Appeal decision in CONDOR's Petition for Review, Appendix B, page 4a, footnote 2; and page 59). Because CONDOR did not raise this issue on appeal or in its Petition to the California Supreme Court, CONDOR cannot raise that issue now. Nonetheless, CONDOR's misleading Petition for Review to this Court does in fact attempt to raise this issue.

Similarly, CONDOR alludes to the fact that the judgment against it was somehow "fraudulent" or "collusive." However, CONDOR was unable to come up with any evidence in support of this defense and CONDOR in fact abandoned this defense.

CONDOR's claims that CONDOR's constitutional rights have been violated are completely without merit. In this regard, the only issue CONDOR raised on appeal was the sole issue of whether or not CONDOR could avoid paying the final judgment rendered against its insured on the ground that the Statement of Damages served by Eriksen in the underlying litigation was insufficient. The California Court of Appeal did not mince words in affirming the trial court's decision. Now CONDOR, in an attempt to further avoid its obligations as an insurer of a Common Carrier, submits a Petition to this Court full of misrepresentations, inadmissible evidence and issues which were never raised in the lower courts.

CONCLUSION

CONDOR's Petition for Review should be denied.

Respectfully submitted,

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